

Before the  
Federal Communications Commission  
Washington, D.C. 20054

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DEC 14 1992

In the Matter of:

Advanced Television Systems and  
Their Impact Upon the Existing  
Television Broadcast Service

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

MM Docket No. 87-268

To: The Commission

Petition for Partial Reconsideration of  
Association of America's Public Television Stations,  
Corporation for Public Broadcasting, and  
Public Broadcasting Service

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The Association of America's Public Television Stations ("APTS"), the Corporation for Public Broadcasting ("CPB") and the Public Broadcasting Service ("PBS") (collectively referred to as "Public Television") respectfully submit this Petition for Partial Reconsideration of the Commission's Memorandum Opinion and Order/Third Report and Order/Third Further Notice of Proposed Rule Making released October 16, 1992 ("Third Report") in the above-captioned proceeding.<sup>1/</sup> Specifically, Public Television requests that the Commission reconsider (a) its decision not to set aside specific ATV channels for noncommercial educational use at the time it adopts the Table of ATV Allotments in the event that it utilizes its proposed first-come, first-served assignment procedure, and (b) its rejection of Public Television's request

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<sup>1/</sup> A summary of the Third Report is published at 57 Fed. Reg. 53588 (November 12, 1992).

that it afford noncommercial stations priority if there are insufficient ATV channels in a market to accommodate all currently operating NTSC stations. Both of these actions will, unless reversed, adversely affect the access of citizens throughout the country to public television service during and after the transition to ATV broadcasting.

**I. Failure to Reserve Noncommercial Channels Prior To Initial Channel Assignments Would Represent An Unjustified Departure From Long-Standing Congressional And Commission Policy.**

Public Television is pleased that the Commission clarified in its Third Report that it will reserve ATV channels for noncommercial use regardless of the procedure it employs to assign channels. See Third Report, ¶ 34.<sup>2/</sup> That action recognizes the unique service provided by public television and the importance of reserving channels for noncommercial use to assure that such service is available in an ATV broadcast environment.

Public Television is concerned, however, that the Commission has not made adequate provision for the reservation of channels in the event that it does not pair NTSC and ATV channels in its Table of ATV Allotments. The Commission has indicated that, if it decides to pair ATV channels with NTSC channels, it will reserve those ATV channels that are paired with noncommercial NTSC channels when it adopts the Table. Id. However, the Commission rejected Public Television's suggestion that it

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<sup>2/</sup> See also Public Television Petition for Clarification and Partial Reconsideration filed June 22, 1992, at 8-12.

reserve channels at the time it adopts the ATV Table of Allotments if it utilizes another channel assignment methodology, such as the first-come, first-served procedure it has proposed.<sup>3/</sup> Rather, in that event, the Commission stated that it will reserve ATV channels at such time as channels are assigned to noncommercial entities. Third Report, ¶ 34. If noncommercial NTSC licensees do not apply for ATV channels during the initial filing window or if reserved NTSC channels remain vacant, the Commission apparently intends to reserve ATV channels for those reserved NTSC channels prior to opening up any remaining ATV channels to applications by entities that are not existing broadcasters.<sup>4/</sup>

Although this procedure would reserve some channels for noncommercial use, it would relegate public television stations to those channels that remain after the initial filing window closes. Those are likely to be the least desirable channels -- those that are short-spaced and, even worse, the few VHF channels that may be required during the transition to ATV. Accordingly, Public Television asks the Commission to reconsider this decision and to reserve channels for noncommercial use at the time it

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<sup>3/</sup> See Second Report and Order/Further Notice of Proposed Rule Making, 7 FCC Rcd 3340 (1992), ¶ 35.

<sup>4/</sup> See Third Report, ¶ 34. The Commission states that it will conduct a rulemaking at that time to determine the methodology it should employ to designate the ATV channels that are to be reserved.

adopts the ATV Table, regardless of the procedure employed to assign ATV channels to licensees.<sup>5/</sup>

A. The Commission's Reason For Not Reserving Channels At The Time The ATV Table Is Adopted Are Unpersuasive.

The Commission gives two reasons for rejecting Public Television's suggestion that it reserve noncommercial channels at the time it adopts a Final Table of Allotments. Neither of the proffered explanations are sound.

First, the Commission asserts that reservation of channels for noncommercial entities that "may not come forward to build for several years and may not even now exist" would contradict the primary purpose of a first-come, first-served approach -- i.e., to give parties that are able to construct ATV stations quickly their preferred channels.<sup>6/</sup> This reasoning, however, does not justify the Commission's departure from its long-standing policy of reserving channels for noncommercial use. Television channels allotted to communities have always been made available on a first-come, first-served basis, yet the Commission has nevertheless concluded that the public interest in assuring the availability of noncommercial educational service required it to reserve channels for this service. It has done so even though it has recognized that such reservations result in the reserved spectrum laying idle for some period of time, and even though

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<sup>5/</sup> This request will be moot, of course, if the Commission decides to pair all ATV and NTSC channels in its Final Table of Allotments, as urged by the Joint Broadcasters.

<sup>6/</sup> Third Report, ¶ 34.

commercial interests have been eager to use the spectrum.<sup>7/</sup> Indeed, it is precisely because the pressures of a first-come, first-served procedure disadvantage noncommercial entities and may operate to exclude them from the airwaves that the Commission has always considered noncommercial reservations necessary and in the public interest.

As Public Television has demonstrated at length in its previous filings,<sup>8/</sup> the rationale for the Commission's reservation policy applies with at least equal force during the transition to ATV service, which will impose costs beyond the immediate financial means of many noncommercial stations. Indeed, given the Commission's intent that ATV eventually supplant NTSC facilities, the failure to reserve ATV channels for noncommercial stations would reverse the enormous strides made during the last forty years in building a noncommercial public television system throughout the nation.

The second reason cited by the Commission for its decision not to reserve ATV channels at the beginning of the assignment process is that it does "not believe that the differences between the ATV channels allotted will be so significant as to cause a serious disadvantage to any noncommercial broadcaster who

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<sup>7/</sup> See Sixth Report and Order on Television Assignments, 41 F.C.C. 148, 159-161 (1952) ("Sixth Report"). See also Public Television Comments dated December 20, 1991, at 3-5.

<sup>8/</sup> See Public Television Comments filed December 20, 1991, at 13-15; Public Television Petition for Clarification and Partial Reconsideration filed June 22, 1992, at 7-12.

receives a channel at the end of the assignment process." Third Report, ¶ 34. While Public Television is not now in a position to evaluate that assertion fully, evidence currently available and acknowledged by the Commission belies that claim.

For example, the Commission has indicated that approximately six percent (6%) of the ATV allotments in its sample Table are short-spaced to other channels, either NTSC or ATV, and some of the channels will be spaced as close as 156 km (97 miles) apart. See Second Further Notice of Proposed Rulemaking, released August 14, 1992, ¶ 31 ("Second Further Notice"). Since the Commission has proposed to protect NTSC service areas over ATV allotments, stations assigned ATV channels that are short-spaced to NTSC stations will be required to operate with reduced service areas at least during the transition period. And, obviously, stations that are short-spaced to other ATV allotments will be forced to operate within constrained service areas indefinitely.

Further, some seventeen stations will be assigned ATV channels in the VHF band during the transition period, assuming the Commission goes forward with its proposal to use UHF spectrum as the exclusive or primary source of ATV channels. The assignment of a VHF channel to a UHF noncommercial station could substantially increase the costs of the station's conversion to ATV by making common use of NTSC and ATV towers and transmission equipment impossible or very expensive. See Public Television



Comments dated November 16, 1992, at 13-15.<sup>9/</sup> Even worse, assignment of a VHF channel on a temporary basis would require a station to incur ATV conversion costs twice -- once during the initial construction period and a second time when the station is required to convert to ATV operation on UHF channels. See id. Thus, there are indeed differences among ATV channels that could seriously disadvantage noncommercial broadcasters who receive a channel at the end of the assignment process.

**B. Established Commission Policy, Ratified By Congress, Requires Prompt Reservation of Channels.**

Public Television will not reiterate here the reasons that channel reservations are crucial to implementing the historic Congressional and Commission policy of fostering a public television service that is comparable in technical quality to commercial service and that covers as much of the nation as is feasible. Those reasons are discussed at length in Public Television's previous filings in this proceeding.<sup>10/</sup> Public Television notes, however, that since it last addressed this issue, Congress enacted and the President signed into law the

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<sup>9/</sup> Conversely an ATV channel that is spaced within 36 MHz of a station's NTSC channel will be highly desirable because it will permit use of a common broad based transmitting antenna and yield substantial cost savings to the station in converting to ATV. See id. at 15 n.16.

<sup>10/</sup> See Public Television's Comments filed on December 20, 1991, at 3-16, and July 17, 1992, at 4-10, and its Petition for Clarification and Partial Reconsideration filed June 22, 1992 at 4-12.

Public Telecommunications Act of 1992, which adds a new section to the Communications Act of 1934. That section states:

[I]t is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies. . . .

Pub. L. No. 102-356, 106 Stat. 949 (Aug. 26, 1992) (emphasis added). The legislative history of the statute makes it clear that Congress not only continues to endorse the long-standing public policy of reserving broadcast channels for noncommercial programming, but believes that this policy should be extended to "new distribution technologies" as well. H.R. Rep. No. 363, 102nd Cong., 1st Sess. 18 (1991). See also S. Rep. No. 221, 102nd Cong., 1st Sess. 7 (1991).<sup>11/</sup> Thus, there can be no doubt of Congressional support for noncommercial ATV reservations.

The Commission's departure, without reasoned analysis, from long-standing and still vital Congressional and Commission policy constitutes arbitrary and capricious decision making.<sup>12/</sup> Public Television thus strongly urges the Commission to reconsider its decision not to reserve ATV channels for noncommercial use prior

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<sup>11/</sup> See also Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (Oct. 5, 1992), which requires carriage of public television programming on cable systems and the reservation of direct broadcast satellite channel capacity for public television programming.

<sup>12/</sup> See, e.g., Motor Vehicle Manufacturers Ass'n. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983); Action for Children's Television v. FCC, 821 F.2d 741, 745 (D.C. Cir. 1987); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

to the assignment of channels in the event that it adopts a first-come, first-served channel assignment procedure.

**II. If There Are Insufficient ATV Channels In Any Market To Accommodate All Existing Stations, Operating Noncommercial Stations Should Have Priority In Channel Assignments.**

Public Television also urges the Commission to reconsider its rejection of Public Television's proposal that, in the event that there are insufficient ATV channels in a market to accommodate all existing stations, operating noncommercial stations should have priority in channel assignments over other operating stations. See Third Report, ¶ 10. The only reason that the Commission has cited for rejecting this proposal is that preferences based on the type of programming proposed by a licensee would require difficult, content-based determinations by the Commission and thus impede the delivery of ATV service to the public in a timely fashion. See Second Report and Order/Further Notice of Proposed Rule Making, released May 8, 1992, ¶ 9; Third Report, ¶ 10.

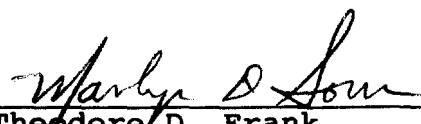
As Public Television has previously observed, however, ensuring that noncommercial television stations are awarded ATV channels would not entail a program-based decision any more than does the reservation of channels for noncommercial use. The preference would be based on the noncommercial character of the licensee, not the content of its programming. See Public Television Comments dated July 17, 1992, at 11-12. Moreover, as previously shown, granting such priority would further established Congressional policy to assure that public television

service is provided throughout the country through all available technologies. See id. Congress has consistently and unequivocally reaffirmed this public policy time and time again, most recently in two different statutes enacted this year. See pages 7-8 supra. Consequently, granting public television stations priority in the assignment of ATV channels in the event of a spectrum shortfall is required by Congressional policy.

#### CONCLUSION

For the foregoing reasons, Public Television respectfully requests that the Commission (i) set aside channels for noncommercial use at the time it adopts the Table of ATV Allotments regardless of the channel assignment procedure it adopts and (ii) give operating noncommercial television stations priority over other stations in the assignment of ATV channels in the event of a spectrum shortfall.

Respectfully submitted,

  
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**Certificate of Service**

I, Paula Lust, hereby certify that on this 14th day of December, 1992, I served a true copy of the foregoing Petition for Partial Reconsideration of Association of America's Public Television Stations, Corporation for Public Broadcasting, and Public Broadcasting Service by hand delivery to:

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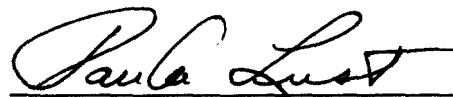
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